

## Statutory Authority

This arbitration was conducted under 47 U.S.C. §252(b). The standards for arbitration are set forth in 47 U.S.C. §252(c):

In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

On August 8, 1996, the Federal Communications Commission (FCC) issued rules pursuant to 47 U.S.C. §§251 and 252. 47 C.F.R. § 51.100 *et seq.*<sup>1</sup>

On October 15, 1996, the Eighth Circuit Court of Appeals stayed operation of the FCC rules relating to pricing and the "pick and choose" provisions.<sup>2</sup> *Iowa Utilities Board v. Federal Communications Commission et al.*, Case Nos. 96-3321 *et seq.* (8th Cir., October 15, 1996) (Order Granting Stay Pending Judicial Review). On November 12, 1996, the United States Supreme Court issued a ruling which declined to lift the stay. The stay will remain in effect until the appeals are decided on the merits. Because of the stay, I have considered the FCC pricing rules to be advisory and not binding on this arbitration.

On November 1, 1996, the Eighth Circuit Court of Appeals issued an order partially lifting its October 15 stay with respect to Commercial Mobile Radio Services (CMRS) issues. The Court determined that the stay should be lifted with respect to reciprocal compensation set forth in FCC Rules 51.701, 51.703, and 51.717. That November 1 order made these FCC rules applicable to this arbitration proceeding.

On July 18, 1997, the Eighth Circuit filed its decision in this matter. The court vacated the following provisions: 47 C.F.R. §§ 51.303, 51.305(a)(4), 51.311(c), 51.315(c)-(f) (vacated only to the extent this rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so), 51.405, 51.505-515 (inclusive), 51.701-51.717 (inclusive, except for 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717, but only as they apply to CMRS providers), 51.809; First Report and Order, ¶¶ 101-103, 121-128, and 180. The court also vacated the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996.

<sup>1</sup> Unless otherwise indicated, references to the "FCC Order" are to FCC 96-325.

<sup>2</sup> The provisions of the rules subject to the stay are 47 C.F.R. §§51.501-515 (inclusive), 51.601-611 (inclusive), 51.701-717 (inclusive), the default proxy range set forth in the order for line ports, and 51.809.

### Commission Review

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state commission. Section 252(e)(2)(B) provides that the state commission may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

Notwithstanding paragraph (2), but subject to section 252, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

### Commission Conclusion

The Commission has reviewed the Arbitrator's Decision and the parties' comments under the standards set out above. Except as indicated below, we conclude that the Arbitrator's Decision comports with the requirements of the Act, applicable FCC rules, and relevant state law and regulations. We have also provided clarification or additional explanation of the Arbitrator's Decision where appropriate.

### USWC Exceptions

*Paging Issue (Issue C):* The Act mandates reciprocal compensation for transport and termination. Because, according to USWC, pagers do not terminate traffic, they are not eligible for mutual compensation under the Act. USWC's argument that paging providers do not terminate traffic is unconvincing. As the Arbitrator's Decision points out, CMRS providers are considered telecommunications carriers under the Act. The FCC Report and Order specifically state that paging providers, as telecommunications carriers, are entitled to reciprocal compensation for transport and termination of local traffic and are not required to pay charges for traffic originating on other carriers' networks. The Eight Circuit decision left those portions of the Report and Order intact. We decline to change the Arbitrator's Decision on Issue C.

*Electronic Interfaces for Operational Support Systems (OSS) (Issue D):* USWC argues for modification of the Arbitrator's Decision to the extent that it requires USWC to provide access to OSS and maintenance and repair electronic interfaces. USWC contends that this issue was not properly raised in the Petition, since it was raised, if at all, by inclusion of certain proposed language in the AWS proposed contract attached to the Petition. USWC concludes that this issue should not be considered. Moreover, USWC argues that the Act does not require it to provide access to OSS for interconnection (as opposed to access for resale and access to unbundled elements). USWC is amenable to working on an electronic

interface for AWS as an interconnector, but requests clarification that it is not required to do so by federal law.

We consider that inclusion of the language referring to OSS in AWS's proposed contract, attached to the Petition, raises the issue for purposes of this Arbitration. As to USWC's argument that there is a distinction between OSS for interconnection and OSS for access to unbundled elements, we disagree. Under the Act, and as held by the Eighth Circuit, OSS constitutes a network element and as such is subject to the unbundling requirements of §251(c)(3) of the Act. The purpose for which a competitive provider employs OSS is irrelevant to this legal requirement. We decline to change the Arbitrator's Decision on this issue.

*Effective Date for Reciprocal Compensation (Issue A(4))*: USWC contends that the Arbitrator's Decision setting the effective date for reciprocal compensation at the date of filing the interconnection request rather than the date when the stay was lifted, is inconsistent with the decision in ARB 7, Western Wireless's petition. We conclude that the legal analysis set forth in the Arbitrator's Decision is correct and decline to change it.

*Access to Poles, Ducts, Conduits, and Rights-of-Way (Issue E)*: USWC does not contest this part of the decision but asks that the Order clarify that access is to be granted only if it is in compliance with safety regulations. The Arbitrator's Decision at pp. 18-19 is modified by the addition of the text below in double brackets:

**Resolution: *Duty to afford access to poles, ducts, conduits, and rights of way is reciprocal; USWC may keep spare capacity for maintenance and administrative purposes based on a bona fide development plan; USWC must take reasonable steps to expand capacity where necessary. [[Access to tops of poles must be consistent with all relevant electric and safety regulations.]]***

\* \* \* \* \*

USWC is to allocate space on its poles, etc., in a nondiscriminatory way, on a first come, first served basis. [[Access to tops of poles shall be consistent with all electric and safety regulations.]] USWC may reserve reasonable space for its maintenance and administrative needs, in accordance with a bona fide development plan.

#### **AWS Exceptions**

*Bill and Keep (Issue A(1))*: The Arbitrator's Decision rejected bill and keep for AWS. AWS argues that its cost study shows that transport and termination costs are in balance even if traffic is not. This is the same argument AWS presented to the Arbitrator in briefs. We do not believe that AWS's reasoning is consistent with the Act and Order. AWS also complains that the Arbitrator's Decision treats AWS differently from all other CLECs who have requested bill and keep.

We conclude that the Arbitrator's Decision with respect to bill and keep is correct. The decision reviews our finding from Order No. 96-021 (CP 1, 14, and 15) that bill and keep is appropriate where traffic is in balance, and recites AWS's admission that traffic between ILECs and CMRS providers is not in balance. Even assuming, for the sake of argument, that we were willing to stretch our classification of appropriate situations for bill and keep to include situations in which costs were in balance, we would not accept an unreviewed cost study such as the one AWS submitted in this proceeding.

*Tandem Issue (Issue A(2))*: AWS argues, as it did in its briefs, that its Mobile Switching Center (MSC) is equivalent to a tandem, in terms of geographic coverage and functionality. AWS objects that the Arbitrator's Decision is based on the Commission's decision in ARB 7.

We adopt the reasoning given in the Arbitrator's Decision for rejecting AWS's argument that the MSC is equivalent to a tandem. On review, we find that the record in this case supports the findings with respect to the MSC in the Arbitrator's Decision.

*Reciprocal Compensation if Bill and Keep is Not Adopted (Issue A(2))*: AWS asks for clarification as to what mileage band applies for the transport element. The Arbitrator's Decision did not specify a mileage band. AWS advocated a 25-mile band for transport (equal to the weighed average transport distance reported by USWC for all mileage bands in other USWC states).

We adopt AWS's proposed mileage band. We modify the Arbitrator's Decision, at p. 5, to add the text in double brackets:

AWS proposes to pay USWC the rates established in UM 351, Order No. 96-283, Revised Appendix C, as modified by UM 844, Order No. 97-239, Appendix C. AWS will pay USWC the tandem rate for traffic terminated at USWC's tandem, plus average transport, and the end office rate for traffic terminated at USWC's end office. [[AWS proposes a 25-mile band for transport (equal to the weighed average transport distance reported by USWC for all mileage bands in other USWC states)]].

We modify the Arbitrator's Decision, at p. 8, adding the words in double brackets:

The Commission has spent years working out a methodology for costing and pricing, and the dockets named above are the result of that work. The methodology is established and reviewable. USWC's methodology and results are unreviewed and the inclusion of a depreciation reserve deficiency is a departure from standard Commission costing/pricing policy. I will adopt the UM 351 rates (set forth in Revised Appendix C to Order No. 96-283) as modified by UM 844, Order No. 97-239, Appendix C, for transport and termination between the parties. [[I also adopt a 25-mile band for transport, as AWS proposes.]]

**Effective Date (Issue A(4)):** AWS agrees with the Arbitrator's Decision's assignment of October 3, 1996, as the effective date for reciprocal compensation, but argues that the effective date determination is tied to what rate should apply between the date of the request for interconnection and the effective date of the arbitrated agreement. This issue is contingent on our taking jurisdiction of the contract between USWC and AWS which may have expired on Dec. 31, 1996, or have been extended its "evergreen" clause by virtue of the parties' omission of a written termination. The Arbitrator did not take jurisdiction over the parties' contract dispute. We adopt the Arbitrator's reasoning and find that arbitration under the Act is not the proper forum to resolve this contract dispute.

**Access to Poles, Ducts, Conduits, and Rights-of-Way (Issue E):** AWS argues that the Arbitrator's Decision allowing USWC access to AWS's poles, ducts, conduits, and rights-of-way is inconsistent with the Commission's decision in ARB 3/6. There the Commission relied on the Act and Order to conclude that access rights differ for incumbents and new entrants.

After reviewing the relevant sections of the Act, we conclude that AWS's argument is correct. The right to obtain access does not extend to incumbent local exchange carriers. Accordingly, AWS is not required to provide USWC with access to poles, ducts, conduit, and rights-of-way owned or controlled by AWS. The Arbitrator's Decision at p. 18 is modified to include the word in double brackets:

**Resolution:** *Duty to afford access to poles, ducts, conduits, and rights of way is [[not]] reciprocal; USWC may keep spare capacity for maintenance and administrative purposes based on a bona fide development plan; USWC must take reasonable steps to expand capacity where necessary. Access to tops of poles must be consistent with all relevant electric and safety regulations.*

The first paragraph on p. 19 of the Arbitrator's Decision is replaced by the following paragraph:

Section 251(b)(4) of the Act requires all local exchange carriers to provide access to poles, ducts, and rights-of-way. However, §251(b)(4) also specifies that access be provided on "rates, terms, and conditions that are consistent with section 224." Section 703 of the Act amends Section 224. Section 224(f)(1) provides that "[a] utility shall provide a cable television system or any *telecommunications carrier* with non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." (Emphasis added.) The definition of "utility" in section 224(a)(1) is amended to include "*any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.*" (Emphasis added.) Section 703 further amends §224(a)(5) to provide that "[f]or purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) *does not include any incumbent local exchange carrier as defined in section 251(h).*" (Emphasis added.)

*Contract Language (Issue F):* The Arbitrator's Decision asks AWS to prepare a contract "within the scope of what is contemplated by the Act and the FCC Order." AWS requests clarification regarding what in its agreement is beyond the scope of the Act.

Except as specifically provided in the Arbitrator's Decision, we find no particular provision of AWS's agreement beyond the scope of the Act and Order. We conclude that the Arbitrator's language was meant merely as a cautionary statement.

*Service Quality Rules (Issue G):* AWS recognizes that our other decisions have declined to impose service quality standards on USWC. AWS requests, however, that our order include the language from ARB 3/6 and several other arbitrations to the effect that USWC must prepare detailed specifications for showing its existing quality and performance standards.

We find AWS's request reasonable and will add the following language to the Arbitrator's Decision at p. 22. This paragraph will be the final paragraph in the section on Issue G:

However, §251(c)(3) of the Act requires local exchange carriers to provide unbundled network elements on a reasonable and nondiscriminatory basis at levels of quality at least equal to the quality the carrier provides itself. Therefore, USWC shall provide AWS current written objective measures of quality for: 1) billing; 2) operator assistance; 3) preorder, order, provisioning, and maintenance/repair; 4) network quality; and 5) provisioning of interconnection and unbundled elements, within 30 days of the effective date of the agreement.

*Physical Interconnection (Other Issues):* AWS objects to the Arbitrator's adoption of USWC's proposed limits on the length of facilities that USWC must construct. AWS argues that the limitation is inconsistent with the Act and past Commission decisions. In previous decisions (CP 1, 14, 15; ARB 3/6) the Commission found that USWC must share the cost of meet point facilities for interconnection, and the parties must negotiate mutually acceptable meet points. Under the Act (§251(c)(2), (3)) and the Order (§553), meet point arrangements are technically feasible and within the scope of the ILEC's interconnection obligations. No limit on the length of facilities is expressed.

We find that AWS's argument is correct. We modify the Arbitrator's Decision at p. 25 by adding the bracketed word:

**Physical Interconnection:** *Parties to negotiate mid-span meet arrangements and points of interconnection; [[no]] limit imposed on length of facilities USWC must construct; compensation necessary; direct trunks to be established when traffic between a USWC end office and the AWS switch exceeds 512 CCS.*

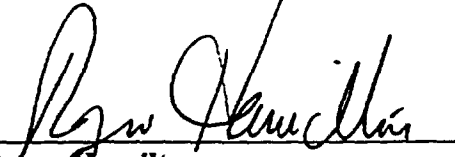
The parties should negotiate meet points for interconnection and traffic exchanged on two-way trunks. USWC's proposed standard for length of facilities it must construct as part


of a mid-span arrangement is rejected. I adopt USWC's proposal to establish direct trunks when traffic between its end office and the AWS switch exceeds 512 CCS.

**ORDER**

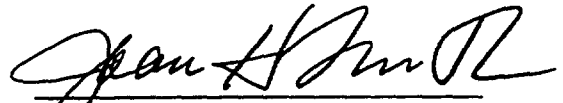
**IT IS ORDERED** that the Arbitrator's decision in this case, attached to this order, is adopted as amended herein.

Made, entered, and effective AUG 04 1997

  
Roger Hamilton  
Chairman

  
Ron Eachus  
Commissioner



  
Joan H. Smith  
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements of OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.